Supreme Court, U.S.
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No. 97-457

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

Rolland Weddell,

Petitioner,

vs.

Bruce I. Hochman, an individual and
Hochman, Salkin and DeRoy,
a Professional Corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents respectfully submit that before this Court deals with the question presented by Petitioner for review, it should first consider whether it should have been addressed in the civil trial court. Petitioner presented the purported constitutional issue for the first time on appeal to The United States Court of Appeal for the Ninth Circuit. That Court declined to rule upon the issue on the ground that Petitioner's arguments for consideration were not compelling and thus it saw no reason to depart from the general rule that issues raised for the first time on appeal would not be considered. Petitioner's arguments for consideration here are no more persuasive.

OPINIONS BELOW, JURISDICTION, STATUTORY PROVISIONS INVOLVED AND PARTIES

Respondents are satisfied with Petitioner's presentation of Opinions Below, Jurisdiction, Statutory Provisions Involved and Parties.

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STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate in several particulars and omits certain relevant facts.

Contrary to the proposition set forth in the first paragraph of Petitioner's statement of the case, the decisions of the Nevada Supreme Court in *Morgano v. Smith*, 110 Nevada 1025, 879 P. 2d 735 (1994) and the California Court of Appeal in *Weiner v. Mitchell, Silberberg & Knupp*, 114 Cal. App. 3d. 39, 170 Cal. Rptr. 533 (1980) do not remove all responsibility for either negligence or fraud of a private attorney representing a client that is guilty of the offense charged. The salutary public policy expressed in those decisions simply denies a guilty defendant one avenue of recourse. The *Morgano* Court specifically says so in footnote 3, 879 P. 2d at p. 737, as did the Supreme Court of Oregon in *Stevens v. Bispham* 316 Or. 221, 851 P. 2d 556 (1993) (which Petitioner erroneously mis-cites as supportive of his view).

In his section entitled "The Underlying Lawsuits" Petitioner inaccurately seeks to portray himself as a defendant who was not guilty but was persuaded by his attorney to plead guilty to offenses he had not committed. In fact, at the relevant

time, Petitioner had not filed federal tax returns for many years, a situation which long predated his being suspected of murder.

Petitioner improperly describes the sentence imposed upon him as "excessive and illegal" (page 4); it was not. The Court of Appeals specifically held, in its unpublished opinion, that the sentence was within the legal range. The issue of the legality of the sentence was never raised by Petitioner and did not arise until a judge of the Court of Appeals asked about it at oral argument.

On page 6 of his Petition, Petitioner emphatically claims that his failure to file tax returns was not willful but does not offer any factual support for that conclusion. When he pleaded guilty to the offenses involved, he was interrogated at great length both by the original sentencing magistrate and again by Judge McKibben. At the second hearing he acted *in propria persona*.

SUMMARY OF ARGUMENT

I. The Question Presented by the Petition was not Raised in the Trial Court.

II. Weddell was not Denied his Right to Effective Assistance of Counsel.

III. Acquittal is a Necessary Element of any Malpractice Claim in a Criminal Case Involving a Private Attorney; Weddell is Precluded from Alleging any "Colorable" Claim of Innocence by Judicial Estoppel and Collateral Estoppel.

IV. The Decision of the Court of Appeals is Correct.

V. Petitioner Should be Precluded from Consideration by this Court because He knowingly Miscites and Misquotes from an Important Case.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. The Question Presented by the Petition was not Raised in the Trial Court.

Petitioner's contention that his Sixth Amendment right to the assistance of counsel was violated by the proceedings in the criminal case is clearly an afterthought that was not raised until Petitioner filed his first brief in the Court of Appeal[1] and then only as an attempt to make the argument more dramatic. That Court ultimately determined that no compelling reason existed why the issue should be considered for the first time on appeal, in the civil cases.

II. Weddell was not Denied his Right to Effective Assistance of Counsel.

Federal and State law and Federal and State Rules of Procedure both provided Weddell with totally adequate vehicles to assert his right to adequate counsel; he did, in fact, conduct post-conviction proceedings on his own behalf in the criminal case and thus availed himself of one of these avenues.

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[1] Petitioner filed two separate appeals which were later consolidated. Both were from the civil cases and no appeal has been taken in the criminal case.

In effect, of course, the District Court had afforded Petitioner the opportunity to again obtain assistance of counsel when it permitted the withdrawal of the guilty plea in the criminal case; he chose not to.

A defendant who, then, without the assistance of any counsel, elected to plead guilty to the same offenses a second time is in no position to argue that his claimed damages were caused by anything other than his own guilt. That is the public policy of the State of Nevada, as set forth in *Morgano, supra*.

As the Supreme Courts of both Oregon and Nevada have held, the sanctity of the judicial process is protected by the alternative remedies available to a defendant and which Petitioner successfully invoked here.

In fact, Hochman's services were more than adequate. He successfully negotiated for misdemeanors instead of the felonies originally sought by the government. The sentence was less than it legally could have been and the judgments Hochman made during the proceedings were both defensible and appropriate.

III. Acquittal is a Necessary Element of any Malpractice Claim in a Criminal Case Involving a Private Attorney; Weddell is Precluded from Alleging any "Colorable" Claim of Innocence by Judicial Estoppel and Collateral Estoppel.

Petitioner did succeed in convincing Judge McKibben to allow him to withdraw his guilty plea. Had he then pleaded not guilty and obtained an acquittal, he could possibly state a claim for malpractice. However, for reasons best known to himself, he again pleaded guilty to the very same charges and participated in a complete and thorough exposition of his actual guilt. By virtue of judicial estoppel and collateral estoppel, he is precluded from seeking malpractice damages from Hochman. *Sterling Builders, Inc. v. Fuhrman*, 80 Nev. 543, 396 P. 2d 850 (1964); *Weiner v. Mitchell, Silberberg & Knupp, supra*; *University of Nevada v. Tarkanian*, 110 Nev. 581, 879 P. 2d 1180 (1994). Petitioner's second guilty plea estops him from attempting to prove his innocence in this proceeding and his innocence is a requisite to stating a cause of action. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324-5, 91 S. Ct. 1434, 1440 (1971).

IV. The Decision of the Court of Appeals is Correct.

Petitioner suggests that the interpretation of *Morgano* and *Weiner, supra*, by the Court of Appeals was erroneous. His argument that he believed the requirements for *Morgano* had been fulfilled by his Second Amended Complaint in the first action and by the allegations of fraud in the second action makes no sense and certainly does not provide a basis to reverse the Court of Appeals, since no explanation is given as to why he thought so.

None of the exceptions to the general rule that the Court will not consider an issue raised for the first time on appeal apply. Petitioner claims that review is necessary to prevent a miscarriage of justice, but that argument has been negated by the statements of policy in the decisions in *Morgano* and *Stevens, supra*; then he talks about the necessity of considering the issue to preserve the integrity of the judicial process. No exposition of that as a potential grounds for exception is or can be made. The integrity of the process is not involved. Nor is the issue purely one of law - an important factual determination must be made as to why the issue was not raised below.

On page 13 of his Petition, Petitioner argues that under the tests set forth in *Morgano* and *Stevens, supra*, a guilty client

has no meaningful right to the assistance of counsel and suggests that counsel doesn't even have to show up. This must be tongue in cheek. Counsel guilty of such egregious conduct would certainly be held responsible to the trial judge and to the disciplinary mechanism of the bar association.

Petitioner attempts to distinguish the *Weiner* case on the basis that Weiner had been found guilty after trial. That is an irrelevant consideration in connection with the issue before this Court. Petitioner seeks to create the inference that he was not guilty and Weiner was, but that of course is not so. Defendant is guilty since, after careful interrogation by both the sentencing magistrate and Judge McKibben, he knowingly pleaded guilty twice, because he had done something which made him guilty. He cannot lay the blame for his guilt on some alleged misconduct of his attorney.

The issue of whether Hochman actually was effective or not is not before this Court but it is clear that he was very effective and obtained a very good result for his client. Petitioner now quarrels with some decisions from the vantage point of hindsight.

Petitioner's argument, at the top of page 16, that financial responsibility and accountability are absolutely

essential to assure that a criminal defense attorney will take his responsibility seriously is an affront to the basic professionalism of lawyers and ignores totally the other remedies available to ensure proper conduct.

Finally, Petitioner attempts to point to two cases which he says upheld malpractice judgments against criminal defense attorneys in the face of undisputed guilt. Both in *Geddie v. St. Paul Fire and Marine Insurance Co.*, LA. App. 354 So. 2d. 718 (1978) and *Lawson v. Nugent*, 702 F. Supp. 91 (D.N.J. 1988), the courts issuing the opinions did not discuss the issue of guilt as a defense. In *Geddie* the opinion stated that the liability of the attorney was not at issue, since the issues before the court were set by stipulation; in *Lawson*, the court was considering motions in limine to determine whether emotional distress damages could be recovered in a malpractice action. Thus neither opinion demonstrates that any court believed that there was a distinction to be made between cases where the complaint was about the conviction and those where the complaint is about the sentence.

V. Petitioner Should be Precluded from Consideration by this Court because He Knowingly Miscites and Misquotes from an Important Case.

As he did in each of his opening briefs in the Court of Appeal, Petitioner here quotes from the opinion in *Stevens v. Bispham, supra*. On page 19 of the Petition, he again provides only a portion of one paragraph of the *Stevens* opinion and emphasizes the last two sentences of that portion, but omits the rest of the paragraph. This is a flagrant, inexcusable attempt to make this Court believe that the *Stevens* Court was saying that a legal malpractice action will lie in the case of a poor result on sentencing or probation.

Even considered alone, the quoted language makes it clear that such an action will be available only in the circumstances of a reversal of a conviction, either outright or by the grant of a new trial. There is no basis for claiming that the language of the *Stevens* Court is ambiguous. The "latter circumstances" referred to in the last sentence quoted by Petitioner are the reversal of a conviction.

In the same paragraph, and immediately following the language Petitioner quotes, appears the following:

> "Although a Plaintiff may wish that he or she had gotten a better deal, we do not consider it appropriate, outside of circumstances where the kind of relief that we have described is available under the post-conviction relief law, to treat a convicted offender as having been caused "harm" in a legally cognizable way by any disposition of that person's cause that was legally permissible." 851 P. 2d at 562.

This, of course, is not the first time that Petitioner has tried to twist the language of the *Stevens* opinion into a useful format. He did precisely the same thing in each of the opening briefs filed in the Court of Appeals. In each instance, Appellee's brief pointed out the compelling language which Petitioner left out. Nevertheless, Petitioner is attempting to perpetrate the same sleight of hand again.

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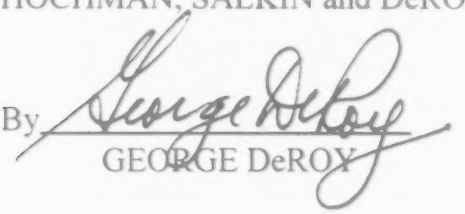
VI. CONCLUSION

Petitioner seeks to transform an issue that was raised in a civil context and decided against him to the level of the constitutional question but there is no good reason why this Court should now consider an argument not raised in the trial court. None of the exceptions apply and Respondents respectfully request that the Petition be denied.

Respectfully submitted,

HOCHMAN, SALKIN and DeROY

By 
GEORGE DeROY

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